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The decision of the Ohio Supreme Court, holding the inheritance tax law of that State unconstitutional, to which we called attention in a recent issue of this JOURNAL, and the enactment of an inheritance tax law by the last legislature of Illinois, renders of special interest information on the subject of such enactments, as gathered by Max West, Ph. D., and which appears in the fourth volume of his studies in history, economics and public law. The volume itself we have not at hand, but we find in the *National Corporation Reporter* a review thereof from which it appears that Pennsylvania in 1826 was the first State to levy an inheritance tax, and this act has served as a model for subsequent American legislation. The Louisiana tax on foreign heirs was held constitutional in Mager v. Grima (1850), 8 Howard, 490. The tax was abolished in 1877. The State of Virginia passed its law in 1844; Maryland, 1845; North Carolina, 1847; Wisconsin, 1874; Alabama, 1848; Delaware, 1869; Minnesota, 1875; New York, 1885; West Virginia, 1887; Connecticut, 1887; Massachusetts, 1891; Tennessee, 1891; New Jersey, 1892; Ohio, 1893; Maine, 1893, and California, 1893. The Wisconsin statute was judged unconstitutional in State v. Mann, 76 Wis. 498. The statute of Minnesota was declared unconstitutional in State v. Gorman, 40 Minn. 232. The question of a permanent tax was since submitted to the people of that State. The State of New Hampshire is the only State which declared an inheritance tax in itself unconstitutional in Curry v. Spencer, 61 N. H. 624. The New York law was held constitutional in the Matter of McPherson, 104 N. Y. 306. In the latter case it was said that tax upon legacies and inheritance have been approved generally by writers upon political economy and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society.

Such taxes were imposed in Rome two thousand years ago, and are now imposed in England and several of the continental countries of Europe, and in the States of Pennsylvania, Maryland and Virginia, and, perhaps, other States of this country.

In 1864 a tax was imposed by the federal government upon successors to real estate. The acts imposing such tax have frequently come before the courts, and have uniformly been upheld. The New York act was severely criticised for many imperfections, showing that there would be great embarrassment and difficulty in executing the act, yet the court thought it could operate without difficulty or embarrassment in the great majority of cases coming within its purview, and there was no reason for condemning the whole act, because in some cases it could not have operation, according to the intent of the legislature.

The Illinois tax has not yet come into actual operation, although it became a law last July. It will, no doubt, be contested in the higher courts. As a general policy of such laws, Mr. Chief Justice Taney said: "The law in question is nothing more that the exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion, may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

NOTES OF RECENT DECISIONS.

LIFE INSURANCE—SUICIDE—MISSOURI STATUTE.—Rev. Stat. Mo. 1889, § 5855, provides that, "in all suits on policies of insurance on life, * * * it shall be no defense that the insured committed suicide, unless it shall be shown * * * that the insured contemplated suicide at the time he made his application for the policy." It was held by the United States Circuit Court of Appeals, Eighth Circuit, in the case of Ætna Life Ins. Co. v. Florida, that the word "contemplated," as used in such statute, is equivalent to "intended" or "had resolved," and that it is not sufficient to show that the insured, at the time of his application, had considered the subject of suicide, without any definite purpose to commit suicide. The court says in part:

The question in the case of paramount importance is whether the Circuit Court properly defined the words "contemplated suicide," as used in Rev. St. Mo. § 5855, *supra*. On this subject the court charged the jury as follows: "The fact of suicide is no defense, unless it be the culmination of a purpose formed at the time application was made for the respective policies. Unless, therefore, you believe from the weight of the evidence that on the 30th day of July, 1891, at the time of making application for the policy of that date, Alonzo K. Florida contemplated thereafter committing suicide, and thereby enabling his wife to collect the amount named in the policy, then your verdict upon the first count must be for the plaintiff. · · · Unless you believe from the weight of the evidence that on the 12th day of July, 1892, at the time of making application for the policy of insurance of that date, Alonzo K. Florida did so with the contemplated, well-formed purpose of thereafter committing suicide, and thereby enabling his wife to collect the amount named in the policy, your verdict must be for the plaintiff upon the second count of the petition. · · · The fact, if from the evidence you believe it to be a fact, that Alonzo K. Florida committed suicide, constitutes in itself no defense on the part of the insurance companies under this clause. In order to make a defense out of such fact, you must believe from the preponderance of the evidence that Alonzo K. Florida, at the time he made application for either or both of the policies of life insurance involved in this suit, contemplated suicide; and by contemplated is meant there was a complete, well-formed purpose of taking his own life, and that purpose culminated by actually killing himself, with a view and for the purpose of defrauding the defendant company out of the money stipulated in the policy to be paid." The objection made to this part of the charge, and the only objection thereto, is that the court declared that the word "contemplated" meant the same as the word "intended." It is insisted that there is a material distinction between the words "contemplated" and "intended;" that the former word means "attentively considered," "thought about," whereas the latter word signifies "a more determinative state of mind," a well-formed purpose; and that the legislature must be presumed to have used the word "contemplated" in the sense above suggested. The proposition maintained by the defendant company is thus concisely stated by its counsel: "It was not necessary for the defendant to show that Florida effected this insurance with the deliberate purpose to commit suicide; it was sufficient to show that he was 'considering with attention' the project of suicide, and effected the insurance with the design that, in case his contemplation should ripen into actual perpetration of suicide, then his beneficiaries should be provided for out of the proceeds of the insurance. · · · Hence it follows that the theory expressed throughout the several portions of the charge bearing on this point, that 'contemplated suicide' meant a predetermined, well-formed purpose of suicide, is erroneous, and those portions of the charge expressing this conception were erroneous." It is no doubt true that the primary signification of the word "contemplate" is to consider attentively or to meditate; but it is equally true that a secondary meaning of the word is to "intend;" and in ordinary conversation the word "contemplated" is frequently used as a synonym for the word "intend,"—that is, to express a well-formed purpose. Moreover, instances are not wanting where the word "contemplate" has been held to be synonymous with the words "expect" or "intend." Thus, in Buckingham v. McLean, 13 How. 151, 167, the words "in contemplation of bankruptcy," as used in the bankrupt act of 1841 (5 Stat. 442, ch. 9, § 2) were held to be tantamount to the expression "expecting or intending to commit an act of bankruptcy." See, also, Jones v. Howland, 8 Metc. (Mass.) 377.

We think, however, that the sense in which the legislature intended to use the word "contemplated" in the statute now under consideration, can be best determined by considering the statute itself and the connection in which the word occurs. The statute was primarily designed to prevent the plea of suicide from being thereafter interposed as a defense to an action on a policy of life insurance. It declares that, "in all suits upon policies of insurance on life hereafter issued by any company doing business in this State, it shall be no defense that the insured committed suicide." The subsequent clause, "unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy," was not intended to create or afford to life insurance companies a new defense to such actions, but rather to state an exception to the general rule first enunciated. The legislature was, doubtless, aware of the fact that at common law, without the aid of any statute, it was competent for an insurance company to show, by way of defense to an action on a life insurance policy, that the assured had taken out the policy with the preconceived intent of thereafter committing suicide, and that such purpose was subsequently executed. It, doubtless, intended by the concluding clause to preserve the right to still make that defense. Smith v. Society, 123 N. Y. 85, 25 N. E. Rep. 197. This seems to us to have been the manifest purpose of the concluding paragraph of the statute. It recognizes the existence of a defense well known to the law, to-wit, the defense of fraud, and authorizes the insurer to make that defense. It must be borne in mind that the general purpose of the statute was to curtail the rights of insurance companies rather than to enlarge them, wherefore it cannot well be presumed that the legislature intended to create in their favor a new statutory defense consisting in the fact that the

assured, prior to his application for insurance, had considered the expediency of committing suicide in a given emergency, although he had formed no fixed resolution to do so. We think, therefore, that the contention that the legislature used the word "contemplated" to signify a state of mind in which the assured had considered or thought about the subject of suicide without having any well-defined purpose or intent, is not tenable.

TRADE-NAME — MANDATORY INJUNCTION.— In Weinstein, Lubin & Co. v. Marks, 42 Pac. Rep. 142, it is held by the Supreme Court of California that a tradesman, by the adoption of the name "Mechanics' Store" for his place of business, may acquire a property right therein as a trade-name, so that equity will enjoin the use by another of the name "Mechanical Store" in such a way as to induce persons to purchase goods from the latter under the belief that they are purchasing from the former. In that case it appeared that a merchant erected a building of peculiar architecture adjoining a similar building occupied by an old firm engaged in a similar business, and, for the purpose of deceiving the customers of such firm, adopted a similar name, and refrained from using any sign about the building to designate the proprietor. The court held that equity could not compel the merchant to designate by signs within and without the building who was the proprietor thereof, but should require him to distinguish his store from the other in some other way that would be a sufficient indication to the public that his store is a different place of business from that of the other. The following is from the opinion:

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store" as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trade-mark, and that, therefore, plaintiff can have no exclusive right to them. As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trade-mark is not the problem to be solved. That these words are of a kind that may be used as a trade-name we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not become technical or specific trade-marks may become the names of articles or of places of business, and thereby the use thereof receive the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in Lee v. Haley, 5 Ch. App. 155: "I quite agree that they (the plaintiffs) have no property right in the name, but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." A similar doctrine is declared in Manufacturing Co. v. Hall, 61 N. Y. 226, and also in the late case of Coats v. Thread Co., 149 U. S. 562, 13 Sup. Ct. Rep. 966. This court said in Pierce v. Guittard, 68 Cal. 71, 8 Pac. Rep. 645: "We are of opinion that it is not necessary to decide whether the plaintiff's label, with the accompanying words and devices, constituted a trade-mark, and, as such, the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to that name or mark." The same general principle is also recognized and approved in Schmidt v. Brieg, 100 Cal. 672, 35 Pac. Rep. 623. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle; and in cases without number, restraining defendants from trespassing upon the good will of plaintiff's business, such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition. In Levy v. Walker, Cox, Man. Trade-Mark Cas. No. 639, the learned judge declared: "The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trade-marks, and provide for the filing thereof with the secretary of State, with accompany any affidavits, etc., yet trade-names are equally protected upon analogous principles of law. And that the words "Mechanics' Store" may be made a trade-name, and the user thereof become entitled under the law to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The court has declared the fact to be, and it is not challenged by defendant, that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the good will of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms. In Celluloid Manuf'g Co. v. Cellonite Manuf'g Co., 32 Fed. Rep. 97, Justice Bradley, of the Supreme Court of the United States, in speaking to the question of similarity in name said: "It was not identical with the plaintiff's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is suf-

ficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law." In this case the trial court determined that there was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business; and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passers-by, indicating his proprietorship; and, while the power of the court to issue mandatory injunction in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where courts have ordered the subject-matter of the litigation to be placed in its original condition; as, for instance, the removing of obstructions to ancient lights. But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanic's Store." By various kinds of advertising, and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its good will, and throughout the Pacific coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento; and defendant thereupon erected a store building, immediately adjoining that of plaintiff's in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its good will. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there was no relief. This cannot be so, for the whole law of trade-marks, trade-names, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device, defendant is defrauding plaintiff of its business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trade-Marks, declares the wrong to be, "not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude; the wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry,—an injustice that is in direct transgression of the decalogue, 'Thou shalt not covet · · · anything that is thy neighbor's'. The most detestable kind of fraud underlies the filching of another's good name, in connection with trafficking." We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed, —a fraud which a court of equity will not allow to thrive. In Howard v. Henriques, 3 Sanf. 725, the court, in speaking of the competitor in business, said: "He must not by any deceitful or other practice impose on the public, and he must not by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality and of the gains to which by his industry and skill he is fairly entitled." It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, enter into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way. In the leading case of Lee v. Haley, *supra*, the whole question is condensed by the final conclusion of the court into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, "If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?" Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways

are as many and as various as the ingenuity of the dishonest schemer can invent. In Glenny v. Smith, reported in the *Jurist* of 1865 (page 965), the court held: "Where a tradesman, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been) the court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm Thresher & Glenny." In Knott v. Morgan, 2 Keen, 213, the "London Conveyance Company" had its omnibuses painted green, and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the court issued its injunction, declaring that plaintiff had "a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages really the defendant's belong to and are under the management of the plaintiff." The author, by a note, approves the doctrine here declared, saying: "There was an obvious attempt to trade upon the plaintiff's reputation,—a constructive fraud,—coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction." The same principle is reiterated by the same learned judge in Croft v. Day, 7 Beav. 84, in the following words: "It has been very correctly said that the principle of these cases is this: That no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud." In the very recent case of Coats v. Thread Co., 149 U. S. 566, 13 Sup. Ct. Rep. 966, the court said: "There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. • • • They have no right by imitative devices to beguile the public into buying their wares under the impression they are buying those of their rivals." To the same point, see System Co. v. Le Boutillier (Super. Ct.) 24 N. Y. Supp. 890; Appolinaris Co. v. Scherer, 27 Fed. Rep. 18; Burgess v. Burgess, 3 De Gex, M. & G. 896; Von Mumm v. Frash, 56 Fed. Rep. 830.

CONTRACT RELATING TO LAND — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS.—In Peevey v. Haughton, it was held by the Supreme Court of Mississippi, upon rehearing, that where a bill for specific performance of a contract to sell land is brought by the party who has not signed the agreement, the filing and signing of the bill take the contract out of the statute of frauds. The court says:

The "offer to perform," referred to in the original opinion as satisfying the statute, is, of course, not a verbal offer, but the offer made in the bill signed in writing by the complainant. The case of Metcalf v. Brandon, 58 Miss. 843, announcing that "if he (complainant) admits it in writing, over his signature, the terms of the statute are met," was not referred to by us, because we did not think it could be seriously questioned, and hence we addressed ourselves to the task of satisfying counsel of the inapplicability of his authorities, in other views. But as the case does not pass unchallenged, as it would seem, we say only that it is certainly undoubted law, and thoroughly settled elsewhere. In Sams v. Fripp, 10 Rich. Eq. 459, the court says, "It has always been held that the requirements of the statute of frauds concerning agreements to convey lands were fulfilled by the signature to the contract of the party to be bound, where the adverse party, by bringing his bill, or any writing, affirms the contract." In Ives v. Hazard, 4 R. I. 27, 28, the court say: "The respondent objects that there was no consideration expressed in the instrument, moving from the complainant to the defendant. A promise without consideration, or a nude pact, is void. We do not understand this promise to be of that character. The defendant agrees with the plaintiff to sell the land in question for the sum of $1,500; the said sum to be paid on the 25th of March, when possession is to be given. True, no consideration had passed from the plaintiff to the defendant; neither had the land, which was the subject of the agreement, passed. The consideration of the agreement to sell the land for $1,500 was the agreement of the other party to buy it for $1,500, and the agreement was thus mutual. It is no objection that the defendant had no power to enforce the contract at the time it was made. If he had chosen to have that power, he might have obtained it, or refused to give such power to the plaintiff. • • • If the defendant had chosen to have his remedy, or his right, to enforce the contract by action, he should have obtained this requisite wherewith to charge the complainant, as he gave it to the plaintiff, whereby he made himself chargeable. It is now well settled by authority that, • • • where there is a bill for specific performance in a court of equity, the bringing of the bill makes the complainant chargeable as on a memorandum of the contract signed by him." In Evans v. Williamson, 79 N. C. 90, 91, the same doctrine is strikingly enforced. In Vassault v. Edwards, 43 Cal. 466, the same rule is declared,—"that the statute is fully complied with if the agreement • • • be signed by the party to be charged, or the party to whom the sale is to be made,"—and the court adds: "It was accordingly held, from an early day, that, where the action for a specific performance was instituted by the party who had not signed the agreement, the act of filing the bill made the remedy mutual." And many other cases to the same effect could be cited. We specially refer counsel to two: Ivory v. Murphy, 36 Mo. 534, and Roberts v. Griswold, 35 Vt. 500, cited in 1 Reed, St. Frauds, § 363. The very argument made by counsel here was made in both those cases. See brief of G. P. Strong, 36 Mo. 536. "Now, a consideration," says Mr. Strong, "is of the very essence of the contract; and, with or without the statute of frauds, no contract wanting this element can be enforced." Says counsel, in his suggestion of error: "If Mrs. Sartor had sued Haughton on his promise to deliver this cotton, she could not

have recovered, because the promise was not in writing, and was consequently void" (unenforceable, rather), "under the statute of frauds. Then, this promise being the sole consideration for her promise to convey the land, the latter is void for want of consideration." But the Supreme Court of Missouri said: Ivory v. Murphy, 36 Mo. 542. "Where the party files a bill, he does an act that will blind him, and from that time there is mutuality; and the other party cannot plead the statute of frauds, because the words of that statute only prevent an action from being brought when the agreement is not signed by the party to be charged. When the bill is filed, it is an attempt to charge the defendant; and, if he has signed the agreement, it is signed by the party to be charged, and it follows that he cannot take advantage of the statute." Mr. Reed says of the latter case, 1 Reed, St. Frauds, pp. 588, 589, § 363. "In a Vermont case, Roberts v. Griswold, 35 Vt. 496, the non-mutuality was made a ground of defense, but counsel, with an obscured perception of the real difficulty, urged the defect as being a want of consideration. The defendant had promised plaintiff, by letter, that, if he would continue as counsel for defendant's brother, the defendant would guaranty the fee. The court, going directly to the point, said: 'But it is claimed, again, that the consideration should appear in writing, in order to give validity to the guaranty. This must either mean that the acceptance of the defendant's proposition must be in writing, or a correlative undertaking on the part of the plaintiff to render future services must be in writing. We can readily understand that this might be required in some cases, as when the guaranty itself did not embody substantially the material and effective terms of the contract, and where resort to parol evidence should be necessary to show what the contract was, in its terms and effect. But we do not understand that this has ever been required when all that is to be done by the other party is merely to accept the proposition in the terms in which it is made, and to perform the consideration either by paying or doing the thing proposed. In the present case the services thereafter to be rendered constitute the consideration, and this is clearly indicated on the face of the defendant's proposition.'" It is not necessary to go so far here, where the consideration may be shown by parol.

COMMON LAW PLEADING.

Common law pleading is a development from, and a result of trial by jury.[1] When it is established that the jury are the tryers of disputed questions of fact, and the judge the expounder of the law, at once it becomes necessary to devise some method by which the facts may be presented to the jury, and the law to the court. In accomplishing this object, we find that it is first necessary to separate questions of fact from questions of law. In making this division, and in preparing the facts and law for presentation to these respective tribunals, who are to adjudicate them, it is necessary to have in mind the different characters of these different forums, as well as the nature of the questions themselves; so taking the last first, we notice that questions of law differ in their essential character from questions of fact, and the method of their determination and decision is likewise different. Questions of law do not require for their determination that conflicting evidence should be weighed and judged of as do questions of fact. Questions of law also require for their determination a previous knowledge of and learning in regard to the general subject to which the question for decision relates. And, lastly, the examination of questions of law may be at large. These considerations indicate that questions of law should be presented to the judge for his decision by some instrument, which would only point the mind of the judge to the question for his decision in a general way. This instrument we find in the common law demurrer by which questions of law arising on the pleadings are presented to the judge for his decision.[2] In the case of questions of fact, we are at once confronted by the difficulty that juries, especially at the early common law, are generally composed of persons of but little education, and are but poorly capacitated to dissect a lengthy declaration and separate the questions of fact from the questions of law therein contained, neither have they or the court time for them to enter on such labors. These considerations suggest that the questions of fact which are to be presented to the jury for their determination should be so presented in the most exact, shortest and clearest manner possible. The instrument by which this object is accomplished is called and denominated the "issue."[3] What is termed the "formation of the issue," properly so called, includes the

[1] The fact that common law pleading is a development from the system of trial by jury, is not noticed by any writer on this subject. Stephen approaches nearer to it than any of them, but it is evident from what he says on pages 123-133, that the whole truth never entered his mind. This truth is further demonstrated by the form of the common law declaration, containing as it does no address to any judge, except in proceedings by bill in the King's Bench. The pleadings were originally oral, and taken down by the clerk in the form of a record as they were recited by the countor in open court, and from this record the common law declaration is derived. Hence, its want of address to any judge, and its brief character. Chitty on Pld., Vol. 1, page 290.

[2] Gould on Pld., ch. II, Secs. 22-43; Stephen on Pld., p. 138; Chitty on Pld., 465-469; *Ib.* 638.

[3] Stephen on Pld., pages 139-143.

whole of common law pleading, the balance, though treated of in some works on pleading, belongs to the domain of practice; so, to follow up this subject of the formation of the issue, would extend this article into a treatise on pleading.

The science of pleading has developed a system of exact logic, which is not surpassed by the logic of the schools. And to master it thoroughly, so as to become a skillful common law pleader, requires patient, earnest study, but when once mastered, the mastery of it makes the accomplished lawyer. And the fact that no man can become even a passably good pleader without patient study, has been, however painful may be the confession, the true cause of the late opposition to pleading.[4] The decided tendency at the present day is toward the civil law system of procedure, by which the plaintiff's case is loosely stated in a so-called complaint, and the defendant's replies to this, with his answer, which included, when necessary, both an answer and a demurrer. It is at once seen that this method greatly embarrasses the trial by jury. The jury being left to gather for themselves from the mass of allegations of law and fact, for this system allows of the allegation of conclusions of law, the precise point in issue. But, as a general thing, the jury repudiates the whole thing and gather for themselves from the evidence and the speeches of counsel the matters in issue. This system is only suited to a trial by a judge, as in chancery, because a jury will not, if, indeed, they are competent, gather from the pleadings the points in issue. Common law pleading is a development of the bold, hardy, exact and positive Anglo-Saxon character. No one can study pleading without being impressed with these characteristics of this, the noblest of races. Observe the pleadings in the cases of the infringement of the right of personal security. The rules of pleading require that whoever imprisons another must justify by pleading, and show specially to the court that the imprisonment was lawful.[5] In replevin, *noncepit modo et forma*, by which the landlord puts in issue not only the taking, but the taking in the place mentioned in the declaration, place being the material issue in the case. The object of this method of pleading was to protect the tenant against the oppression of his landlord, making it unlawful for the landlord to distrain the tenant's property off of the demised premises. And, generally, in cases of the infringement of personal rights, the defendant, when he admitted and justified the charge, was required to state all the facts in his plea, however multifarious they might be. Because each fact essential to the defense was matter of law, and they should all be stated, to the end that the plaintiff might be fully protected by having the judge pass on the sufficiency and legality of the defense. In this way, the injured plaintiff was protected in all his rights—the judge by the requirement mentioned above, protecting him against a sham defense, and a jury of his neighbors passing on and trying the truth of this defense.[6] By the rules forbidding departures and duplicity in pleading the cause was hastened to an issue, and thus litigants were saved the expense resulting from prolixity, redundancy and obscurity. But, by the statutes of most of the States, abolishing special demurrers, a plaintiff, when it accords with his interest, can, by a departure in his pleading, take new ground and bring a new case forward for consideration, or by a multiplicity of issues embarrass the case and increase the cost. In fact, in consequence of the statute above referred to, there is no telling from the declaration as to what grounds the case may be finally settled on. A want of knowledge or a disregard of the rules of pleading has worked great practical injury in not a few instances. Take the case of the force and effect of a judgment of one State, when set up or declared on in another State. The Supreme Court of the United States, in the case of Mills v. Duryee,[7]

[4] Burns v. Cushing, 96 Cal. 669; Boston & L. R. Corp. v. Nashua & L. R. Corp., 31 N. E. Rep. 1067; Curtis v. Watson, 64 Vt. 536; Am. & Eng. Encyclopædia of Law, Vol. 18, pages 491-505. "An inquiry into the proper mode of trial:" Philadelphia, 1885, page 12; Taylor's Evidence, 8th Eng. Ed., Sec. 302; Harris v. Gamble, L. R., 7th Ch. D. 877; Earp v. Henderson, L. R., 2 Ch. D. 254.

[5] Chitty Pld., Vol. 1, page 363; Gould on Pleading, page 278; Marchell v. Garrett, 3 Salke. 64; Glanville (lib. 6 ch. 43); *De exceptionibus*, Bract. 400*a*; Sir Mathew Hale Hist. Com. Law, 173; 3 Keeves, 578; 12 Mod. 276.

[6] Chitty on Pleading, Vol. 1, page 360; Stephen on Pleading, pages 125-130; Kennedy v. Strong, 10 Johns. Rep. 289-291; Gregory *et ux.* v. Hill, 8 T. R. 299; Ratcliffe v. Burton, 3 Bos. & Pul. 223; Taylor v Needham, 2 Taunton, 278.

[7] In Mills v. Duryee, 7 Cranch, 481, the plea of *nil debet* was interposed to the declaration, but the court

in which case was involved the question of the force and effect of a judgment of a State court, when set up and relied on, or declared on in another State, the court, in their judgment in this case, said, in substance: that the office of a plea of *nul tiel* record was to put the record declared on in issue, the object of the plea was to put the fact of the existence of the record in issue. This decision was strictly in accordance with the laws of pleading, this was strictly a correct statement of the effect of the plea.[8] The consequence was, that the question of jurisdiction of the court rendering the judgment over either the person or property of the judgment defendant was not in issue, and could not be litigated under the issue made by the plea of *nul tiel* record.

But some State courts, overlooking or being ignorant of the distinction between the existence of a record and the effect and operation of a record, were disposed to preclude and forbid all inquiry into the effect and operation of the record. But Judge Savage of New York, in an able opinion, called attention to the well established rule of pleading, that the existence of a record was one thing, that the effect and operation of a record was quite another and different thing, and that the first was put in issue by the plea of *nul tiel* record; that the second was tested, and could be tested by any special plea appropriate to the facts; hence, if the court rendering the judgment failed to acquire jurisdiction over the person or property of the defendant by the proper service of process, or, if the judgment was vitiated by fraud, that these facts should form the subject-matter of special pleas.[9] Judge Parsons of Massachusetts about the same time delivered a judgment to the same effect.[10] In the south, Judge Collier of Alabama[11] reviewed all these decisions and recognized them as correct annunciations of the law and the rules of pleading involved. But it was only till of late years that this question of the effect of a judgment of one State, when offered in evidence in a sister State, has been finally, everywhere, in all the States accepted and received in accordance with the law, as laid down by the Supreme Court of the United States in the case of Mills v. Duryee. The rules of pleading not only shape and mould the allegations and counter allegations of the case in which the particular pleadings are filed, but they also have reference to future disputes concerning the same subject-matter, and herein do we find one of the great excellencies of common law pleading. This at once appears from an examination of well drawn pleadings in any case. In the first place, by the rule requiring the allegation of only issuable matter, the pleader is prohibited the statement of conclusions of law, and is required to allege only the facts; thus, the defendant plead that, "A lawfully enjoyed the goods of felons," this plea was held bad, because the plea improperly complicates matter of fact with matter of law,[12] for the jury cannot determine whether he lawfully enjoyed, nor the court whether he in fact enjoyed. The plea should have stated the particular facts by which A did enjoy. The matter alleged by the plea was not issuable. Again, the matter of the pleading should not be stated argumentatively. Thus, if *scire facias* be brought against a parson for the arrears of an annuity recovered against him, and he plead that before writ brought he had resigned into the hands of the ordinary, who accepted thereof, the plea is bad, for he should have plead directly that he was not parson on the day of the writ brought, instead of pleading facts from which that conclusion was to be drawn.[13] Lastly, not to take too much time with this subject, the matter

makes the argument above given, to show that this plea in that case was bad, and that *nul tiel* record should have been pleaded. Weaver v. Barden, 49 N. Y. 286; Allis v. Leonard, 46 N. Y. 688; Miller v. Ins. Co., 1 Abb. N. C. (N. Y.) 470; Goodwin v. Kirsch, 37 N. Y. Sup. Ct. 503.

[8] 19 John. 162; 2 Stewart (Ala.), 315; Chitty Pld. Vol. 1, page 481; McFarland v. Trevin, 8 Johns. R. 77; Bently v. Downelly, 8 T. R. 127.

[9] 19 John. 162; St. Abans v. Bush, 4 Vt. 58; Newcomb v. Peck, 17 Vt. 302; Clarke v. Day, 2 Leigh (Va.), 172; Spencer v. Brockway, 1 Ohio, 260; Goodrich v. Jenkins, 6 Ohio, 43; Gulick v. Loder, 13 N. J. L. 68; Larming v. Shute, 2 South. Rep. 778; Chipps v. Gancey, 1 Ill. 19.

[10] 9 Mass. 467.

[11] 2 Stewart, Ala. 315.

[12] The case of Abbot of Strata Marcella, 9 Co. 24; Chitty on Pld., Vol. 1, page 520. We note the following cases as being opposed to the doctrine above laid down in reference to the force and effect of a judgment of one State, when set up or declared on in another sister State. Clark v. Mann, 33 Me. 268; Thurber v. Blackburn, 1 N. H. 242; Judkins v. Union Mut. Fire Ins. Co., 37 N. H. 470; Wright v. Boynton, 37 N. H. 9.

[13] 2 Anders, 179; Bac. Ab. Peas. 1-5.

of the pleading should be alleged with certainty, of which there are three kinds, to-wit: common certainty, general certainty and universal certainty, the latter being seldom used, and in no case other than such pleas as are not favored in law, as the plea of alien enemy. And strange as it may seem it is nevertheless a fact, that the judge unskilled in the rules of pleading will lean to too great particularity on this subject. To apply the rules of certainty we must first be familiar with the principles of law involved in the particular matter under consideration, so as to know when a legal right has been stated by the pleader, then it becomes an easy matter to determine when the right is stated with sufficient certainty. Bearing in mind that greater certainty is required of the accuser than of the defendant, and that ordinarily it is sufficient for the pleading to show a *prima facie* legal right without recurring to possible facts which do not appear.[14] But in this case the pleader must not attempt to accomplish this by the use of the word "certain," as in the case given by Mr. Chitty, where the declaration stated: "that in consideration that the plaintiff had sold to the defendant a certain horse of the plaintiff at and for 'a certain quantity of certain oil,' to be delivered within a 'certain time' which had elapsed," the declaration was held bad.

Other instances might be stated, but we hasten on. The object of all these rules was that the record might clearly ascertain the subject-matter of dispute, to the end, not only for the purposes of trial, but that in all future time, should the same matter be again brought in controversy, the record will at once show exactly what was decided in the first and original lawsuit.[15] How far superior are these rules to some of the modern so-called Code systems of pleading. Take this, for example, "If a pleading be vague and uncertain, so that the precise nature of the claim or defense do not appear, the court, on affidavit by the defendant, that it is necessary for his defense on the merits, that the claim should be more particularly stated, the court may, on the filing of this affidavit, order the plaintiff to deliver to the defendant a specific bill of particulars of his claim." This provision has been adopted by several States from the laws of the State of New York. Now, could anything well indicate a greater lack of certainty in pleading than this provision? How, in cases of judgment by default, etc., could such a provision have any operation. It is equally important in cases of judgment by default that the declaration should show a title to the judgment demanded, as in such cases there is no verdict or anything else to cure a defective title in the declaration. Again, by the force of this provision, instead of having the plaintiff's case stated in one well drawn declaration, the same may be contained in half dozen "bills of particulars." And great negligence is encouraged by this provision, since the plaintiff knows that instead of having his case dismissed on demurrer, he can answer the defendant's objection by filing his "bill of particulars," and this as often as the defendant may object.[16] There is another Code provision on this subject of the statement of the plaintiff's case, which is much relied on by some circuit judges, but which, in itself, is utterly destitute of merit. This provision as found in most of the Codes reads in substance thus: "If, on demurrer to any declaration for a defective statement of the plaintiff's case, the court should be of opinion that the statement of the case in the declaration is sufficient to insure a trial on the merits, that in such case the declaration shall be sufficient." Now, how is it possible for a circuit judge on demurrer to a declaration to anticipate the evidence, and say beforehand what the merits will be, when he has not heard, and could not on demurrer to declaration, hear one word of the evidence? How can the judge, on demurrer, say or form a correct idea of what the merits of the case are, if, indeed, the judge at this stage of the case knows what the merits are, then he should come down from the bench and let some judge take his place, who has too much honor to allow the plaintiff to inform him of the merits of the case before trial of the same. This statute is drawn as if the law maker intended the judge to make himself informed as to the plaintiff's case before trial.[17] Duplicity in

[14] Chitty on Pld., Vol. 1, page 241.

[15] Chitty's Pleading, Vol. 1, 237; Gould Pld., Secs. 52-59, ch. 3; Clark v. Dales, 20 Barb. (N. Y.) 42; Judge v. Hall, 5 Laws (N. Y.), 69; Gilbert v. York, 41 Hun (N. Y.), 594; People v. Rydner, 12 N. Y. 433.

[16] Tilton v. Beecher, 59 N. Y. page 176, 17 Am. Rep. 337; Reed v. Reed, 98 N. C. 517; Hummell v. Moore, 15 Fed. Rep. 380; Bank v. Closson, 29 Ohio St. 78.

[17] American & English Encyclopædia of Law, Vol. 18, pages 511-522.

pleading has been practically abolished in some of the States. I am free to admit that it is perhaps well enough to allow of the formation of several issues on the declaration. But I agree in opinion that the early construction given to the statute of 4 Anne ch. 16, whilst contrary to the letter of the statute as how held, is, nevertheless, the best practical construction of this statute. And that whilst many issues may be formed on the same declaration, such issues should be consistent with each other, and inconsistent and contradictory issues should not be allowed. But, however, this may be, I am opposed to the multiplication of issues by the replication, and think that our statutes extending the provisions of the statute of 4 Anne to replication is a great mistake. Litigation is sufficiently protracted and expensive, even under the strict rules of common law pleading, and this delay and expense should be increased as little as possible.[18] Special pleading furnishes an example of the adage that history repeats itself. Justice Blackstone says, in substance, that the science of special pleading having been perverted to purposes of chicane and delay, the courts in some instances, and the legislature in many more, have permitted the general issue to be pleaded, which leaves everything open, the facts, law and equity of the case, and have allowed special matter to be given in evidence at the trial. And it should seem that great confusion would result from a relaxation of the strictness once observed, yet experience has shown it to be otherwise, especially with the aid of a new trial, in case either party be unfairly surprised by the other."

But experience has not borne out the statement of the commentator. And, in many of the States, the general issue has been restricted by requiring the defendant to give notice, with his plea of the general issue of special matter in avoidance of the action. In some States they have required all defenses to be specially pleaded. And even in England they have in most instances abolished the general issue altogether, and require all defenses to be specially pleaded. So that the pendulum has oscillated backward to the old practice of special notice, either by special plea, or the general issue with notice.[19] And now the practice is exactly what Mr. Blackstone says it anciently was; that is, only to plead the general issue, when it is intended to wholly deny the declaration.[20] The general issue is a denial of the declaration in shorthand. In other words, it is a brief formula which puts in issue every fact which the plaintiff would have to prove on a denial of the declaration to sustain his case. And when confined strictly within these limits, it becomes an exceedingly useful and brief plea. The plaintiff has nothing of which he can complain, because this plea gives him ample notice of the evidence to be offered under it by the defendant. But when the defendant's evidence extenuates or palliates the charge, then to allow him to plead the general issue works a great hardship on the plaintiff, because this plea in such case fails to apprise the plaintiff of the evidence which the defendant may offer under it. Not only this, but there is another serious objection to admitting affirmative matter in avoidance under the general issue. To appreciate this, we must bear in mind that the judge decides and declares the law, and the jury decides on the facts. Now, to admit affirmative matter in avoidance under the general issue, leaves the fact and law at large, and refers both to the jury. It is true that this may be partially remedied by the judge charging the jury as to the law arising on the facts, but still this only partially meets the difficulty. And the proper pleading in cases where the defendant's evidence consists of matter of avoidance of the cause of action is to embody such matter in a special plea, in which case the sufficiency of the plea as a defense can be determined by the judge on demurrer to the plea. The statutory method of giving notice of affirmative matter under the general issue is objectionable, among other reasons, that it refers fact and law to the jury. Connected with this subject of the general issue,[21] is

[18] Blackstone's Coms., Vol. 3, page 306; Humphreys v. Bethily, 2 Vent. 198; Saunders v. Crawley, 1 Rolle, 112; Gaile v. Betts, 3 Salk. 142.

[19] What is here meant is, that the old practice of a general issue in denial only, is now practiced. Edson v. Weston, 7 Cow. (N. Y.) 278; Smart v. Baugh, 3 J. J. Marshall (Ky.), 363; Wilt v. Ogden, 13 Johns. (N. Y.) 56; Craig v. Whips, 1 Dana (Ky.), 375.

[20] Not admitting thereunder affirmative matter, that to admit affirmative matter notice thereof must be given. Baylies v. Fettyplace, 7 Mass. 325; Carvill v. Garrigues, 5 Pa. St. 152; Offutt v. Offutt, 2 Har. & G. (Md.) 178; Dawson v. Tibbs, 4 Yeates (Pa.), 349.

[21] Chitty on Pld., Vol. 1, 499; Com. Dig. Pleader, 3

what is termed, for the want of a better name, color in pleading. Color is a term derived from the ancient rhetoricians, and signifies an apparent or *prima facie* right. And this color often works to make a good special plea, where, without it, that is, without giving color, the plea would be bad as amounting to the general issue.[22] As illustrating this subject of color in pleading, we will give the following case, which, not only illustrates the subject in hand, but also shows that without the doctrine of color, special pleading as a science is abrogated. The plaintiff declared in an action of trespass against a sheriff to recover damages for taking away and converting certain goods, wares and merchandise of the plaintiff. The defendant plead two special pleas, stating in the first special plea, that as sheriff he took the identical goods mentioned in the declaration under an attachment in his hands against one R C, and that the goods were replevied by R C. The second special plea states, that as sheriff he took the identical goods mentioned in the declaration under an attachment in his hands against J C C, stating also, in substance, that the goods were the property of J C C, but held by R C for the purpose of defrauding the creditors of J C C. The plaintiff demurred to the second special plea, because it appeared from said plea that the goods levied on as the property of J C C, the plaintiff, were the identical goods which had already been attached as the property of R C and replevied by him, and, therefore, the goods were in *custodia legis* and not subject to attachment.[23]

But the court said that the pleas were separate and distinct, containing no reference, one to the other, and that the fact contended for could only be made to appear by taking the two pleas together, which, for the reasons stated, was not allowable in this case. Now, the most casual examination of the first special plea will show that it is equivalent to the general issue. Because, if as stated in the first plea, the goods levied on by the sheriff were not the property of the plaintiff, but were the property of a third person, then the sheriff was not guilty of a trespass on the plaintiff's property, and should have plead the general issue, not guilty. Observe, the ground of the demurrer is, that it appears from the two pleas that the goods levied on as the property of J C C were the identical goods which had been attached as the property of R C and replevied by him. But it is not stated in the first plea that the goods were the property of J C C; that is, the first plea wants color, neither is it stated in the second special plea that the goods were levied on as the property of R C and replevied by him. Now, the first special plea is not in confession and avoidance, it does not admit an apparent, or *prima facie* right in the plaintiff, but simply states that as sheriff the defendant took the goods as the property of a third person, one R C. If the first special plea had stated that which is stated in the second special plea, to-wit, that the goods in question were the property of J C C, but held by R C for the purpose of defrauding the creditors of J C C, then the first special plea would have been in confession and avoidance; that is, the plea would have confessed an apparent or *prima facie* right in the plaintiff, which apparent right would be avoided by the subsequent statement, that these goods were held by R C for the purpose of defrauding the creditors of J C C.[24] If the plea, the first plea, had contained these allegations, it would have given color to the plaintiff, and would not have been objectionable as being equivalent to the general issue. So, we see that counsel for the plaintiff were correct in demurring to these pleas, but the causes of demurrer assigned are not tenable. They were like unto men blindfolded reaching out for something for a defect which they failed to locate, and it must be confessed that the court did not lead them to the light. We have not time or space to treat of the subject of express color. We will only say that it was a scheme devised by the ancient pleaders to make a good special plea, where without it they would be compelled to plead the general issue, and was, especially, useful in the trial of land titles, wherein by means of this device, the defendant could especially state his title in his plea,

M. 40, 1; Leyfield's Case, 10 Rep. 88; Com. v. Boyer Cro. Eliz. 485; McPherson v. Daniel, 10 B. & C. 263.

[22] 2 Saunders, 319, n. 6; Bac. Ab. Pleas, 1, 5; Radford v. Harbyn, Cro. Jac. 122.

[23] Clements v. Cribbs & Covington, 19 Ala., page 241; Bac. Abr. Trespasses, T. 4; 3 Reeves, 438.

[24] Chitty on Pld., Vol. I, pages 498-501; Stephen on Pld., pages 202-215-316-421; Gould. Pld., ch. 6, pages 343-373; Am. & Eng. Encyclopædia of Law, Vol. 18, pages 556-557.

and the defendant would be compelled to take issue on some particular allegation in the plea; that is, upon some particular link in the chain of title, the rules of pleading requiring that the replication must be single and put in issue only one point. Thus on the trial, the evidence would be confined to some particular link in the chain of title, instead of ranging over the whole title. In the case referred to in 19 Ala. page 241, the first special plea did not confess any right in the plaintiff to the goods, on the contrary the plea stated that the goods were the property of a third person. If this were true, the defendant should have plead the general issue not guilty, since if the goods belonged to a third person, then the defendant was not guilty of a trespass on the plaintiff's property, so the first plea was a special plea, which contained facts in denial of the declaration, without admitting an apparent right in the plaintiff; that is, did not give color. The facts stated in the two pleas should have been combined in one special plea.[25]

LINTON D. LANDRUM.

Columbus, Miss.

[25] Chitty on Pld., Vol. I, 499-502; Radford v. Harbyn, Cro. Jac. 122; Stephen Plead. (9 Am. Ed.) 205.

CONTRACT IN RESTRAINT OF TRADE — CONSIDERATION — PHYSICIAN'S PRACTICE—SALE OF—INJUNCTIONS—PLEADING.

BEATTY V. COLBY.

Supreme Court of Indiana.

1. Contracts should be so construed as to uphold, rather than defeat them.

2. A contract in restraint of trade should be construed or interpreted from the language employed therein, and from the circumstances surrounding the contracting parties, and thus get at their intention as expressed in the instrument.

3. Where one physician enters into a contract with another, and agrees to retire from practice in a given community in consideration of the purchase by the latter of the residence of the former therein, the stipulation not to practice is not complied with by a good faith retirement for eighteen months; it must be construed to mean a permanent retirement,—such contract may be enforced by injunction.

4. A plea in such case setting up in substance, that the residence in question was not the property of the defendant at the time of the making of the contract refered to, but that it belonged to his wife, and therefore, that no consideration passed between the plaintiff and the defendant for the execution of the contract agreed on, does not state facts enough to show a want of consideration.

5. The adequacy of the consideration will not ordinarily be inquired into in such cases. It is enough if some legal consideration appears.

6. The fact that the plaintiff in an action brought to enjoin the breach of a contract involving a physician's practice, has removed pending an appeal by him, to another place, does not deprive him of the right to prosecute his appeal, the fact being that the person he seeks to enjoin, has resumed practice in territory covered by such contract, he likewise continuing to practice therein.

MCCABE, J.: The appellant and appellee are practicing physicians and surgeons. The appellant sued the appellee to enjoin him from a violation of the following contract: "Spencer, Indiana, Nov. 2, 1891. Whereas, I am contemplating removing from Spencer, and whereas, William H. Beatty, a practicing physician of Morgan county, is desirous of locating in Spencer, Indiana: Now, therefore, in consideration of the purchase of my property by said William H. Beatty, I hereby agree that within a reasonable time, and as soon as I can arrange my business and conveniently leave my said field of practice, I will retire from the practice of medicine and surgery at Spencer, Indiana. Jacob Coble." There was a demurrer to the second paragraph of the answer, for want of sufficient facts, overruled. A trial of the issues formed resulted in a finding and judgment for the defendant over appellant's motion for a new trial. Error is assigned on the action of the court in overruling said demurrer and in overruling the motion for a new trial. The sufficiency of the complaint is called in question by the appellee, as he may, in his defense of the ruling on the demurrer to the second paragraph of the answer, as a bad answer is good enough for a bad complaint. Appellee also questions the sufficiency of the complaint by assigning for cross error that the Circuit Court erred in overruling a demurrer thereto for want of sufficient facts.

The material facts alleged in the complaint are: That both parties were practicing physicians and surgeons, the defendant in Spencer, Ind., and the plaintiff in Morgan county, Ind. And in consideration that plaintiff would purchase of said defendant his residence in Spencer, in Owen county, Ind., for the sum of $1,500, said defendant agreed with plaintiff that he would leave his field of practice which was coextensive with said county, and retire therefrom, and leave the same to the plaintiff, making the written contract above set out an exhibit and a part of the complaint. That, in pursuance of said agreement, he did purchase of said defendant said property for $1,500, and paid said defendant said sum. That said contract was entered into, and said purchase made, with the design and intention of plaintiff engaging in the practice of his profession at said town of Spencer, and in the former field of practice of said defendant, and without having the competition of said defendant therein. That defendant did, within a reasonable time thereafter, to-wit, August 15, 1892, retire from his field of practice at said town of Spencer,

and did remove from said town and county to a distant part of the State. That plaintiff has ever since been engaged in the practice of his profession, and is now so engaged in the former field of practice of said defendant. But that defendant, wholly disregarding his said contract and agreement with said plaintiff, and in violation thereof, did, on February 1, 1894, remove back to the town of Spencer, and opened an office, and has ever since been engaged in the practice of his profession at said town of Spencer, and in his former field of practice. That such violation of said contract is likely to and will result in great and irreparable damage to plaintiff in his future practice, the defendant being wholly insolvent. That the plaintiff has duly performed all the conditions of said contract. Prayer for an injunction.

The objection urged to the complaint is that the contract on which it is founded contains no express provision that the appellee shall not afterwards resume his practice as formerly. Appellee's counsel cite us to many authorities in support of this objection, the substance of all of which is summed up in one of them, namely, High, Inj. § 1169. It is there said: "Some conflict of authority exists upon the question whether, in the absence of an express agreement against resuming business in a given locality upon the sale of a business with its good will, equity should interfere by injunction to prevent defendant from so resuming. The better doctrine, however, is that to warrant a court of equity in interfering by injunction in such cases there must be an actual contract, and the court will not imply a covenant on the part of one who sells the good will of a trade or business not to carry on the same trade or business in that locality. It follows, therefore, that where one has sold the good will of his trade without any express covenant preventing him from resuming the trade in that vicinity, he will not be enjoined from resuming it." It will be found that this principle is the outgrowth of sales of stock in trade in an established house or place of business, with the good will of customers in the habit of doing business at that place. In such a case the sale of the stock in trade and entire business, with the good will attached, puts an end to the business of the seller, at least for the time being, without any other agreement or stipulation than the transfer of the property, both tangible and intangible. It has often been contended that such a sale carried with it an implied agreement that the seller would not resume the same business, or again engaged therein, in that locality, and thereby take away from the purchaser that which he had sold to him,—the good will of the habitual customers of such business. It finally became settled that the mere sale of the goods, stock in trade, and good will attached, without any express stipulation not to resume or again engage in the business in that locality on part of the seller, were not sufficient to warrant a court of equity in restraining the seller from again engaging in such business in the same locality. 10 Am. & Eng. Enc. Law, 945-947, and authorities there cited; 3 Pars. Cont. 368; Wat. Spec. Perf. § 35; Rawsom v. Pratt, 91 Ind. 9; Beard v. Dennis, 6 Ind. 203; High, Inj. §§ 1169, 1180; Eisel v. Hayes (Ind. Sup.), 40 N. E. Rep. 119. But the contract before us, aside from the stipulation in relation to leaving and retiring from appellee's field of practice, caused no interruption of his business, as in case of a sale of an entire stock in trade. That contract must be construed or interpreted from the language employed therein, and from the circumstances surrounding the contracting parties, and thus get at their intention as expressed in the instrument. It is conceded by the appellee that the express stipulation of the contract required him to retire from the practice at Spencer. But he thinks a good-faith retirement for a year and a half was a sufficient compliance with that stipulation. So that both parties construe the contract to be and contain an express agreement by appellee to leave and retire from that field of practice. The plain meaning and import of that is that the appellee agrees not to engage in the practice in that field, without limitation as to time. Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. Rep. 802. The want of such definite limit is no objection to such a contract. Eisel v. Hayes, *supra*. If that express stipulation is complied with by a good-faith retirement for eighteen months, then it would be complied with by one month's retirement, and, if one month, then one day, or even a shorter period. So that it is clear that such a construction destroys the stipulation entirely, and defeats the expectation and intent of both parties. Contracts should be so construed as to uphold rather than defeat them. Irwin v. Kilburn, 104 Ind. 113, 3 N. E. Rep. 650. The stipulation here means that the appellee will not practice his profession in the territory named. Such contracts have been uniformly enforced by injunction. Cook v. Johnson, 47 Conn. 175; Mallan v. May, 11 Mees. & W. 653; Clark v. Crosby, 37 Vt. 188; Smalley v. Greene, 52 Iowa, 241, 3 N. W. Rep. 78; 10 Am. & Eng. Enc. Law, 945, 946, and authorities there cited. It is contended that the complaint is bad because it does not disclose an adequate consideration. It seems to be the settled law now in such cases that the adequacy of the consideration will not be inquired into. It is sufficient if some legal consideration appears. Duffy v. Shockey, 11 Ind. 70; 22 Am. Law Rev. 887, 888, and authorities there cited; Eisel v. Hayes, *supra;* Greenh. Pub. Pol. 718, 719, and authorities cited. The complaint was therefore sufficient.

The material facts alleged in the second paragraph of the answer are that the appellee, at the making of said contract, was not the owner of the property conveyed to the plaintiff, but the same was the sole and separate property of defendant's wife, Marietta Coble, which was built for and used as a residence, and not a physician's office; and no part of the consideration for said

conveyance was ever received by defendant, and that no consideration ever passed between plaintiff and defendant for the execution of the agreement sued on. This pleading does not state facts enough to show a want of consideration, for which it was evidently and confessedly pleaded. Laundry Co. Lockwood (Ind. Sup.), 40 N. E. Rep. 677, and authorities there cited. A motion is made to dismiss this appeal on the ground, made to appear in affidavits, that since the appeal was taken the appellant has located in the town of Worthington, in Green county, to practice his profession, which reaches into portions of Owen county, the appellee's former field of practice, in which parts appellant still continues to practice. These facts do not deprive the appellant of the right to continue to prosecute his appeal. No authority is cited to support the motion, and we know of none. The Circuit Court erred in overruling the demurrer to said answer. The judgment is reversed, with instructions to sustain the demurrer to the second paragraph of the answer.

Jordan, J., took no part in this decision.

NOTE.—*Agreements in Restraint of Trade—Ancient Rule—Modern Rule.*—"The law concerning restraint of trade has changed from time to time with the changing conditions of trade, but with trifling exceptions these changes have been a continuous development of a general rule." "The earlier cases show a disposition to avoid all contracts to prohibit or restrain any, 'to use a lawful trade at any time or at any place,' as being 'against the benefit of the commonwealth.' Colegate v. Bacheler, Cro. Eliz. 872 (1596). But soon it became clear that the commonwealth would not suffer if a man who sold the good will of a business were able to bind himself not to enter into immediate competition with the buyer, and so it was laid down in Rogers v. Parry, Bulstrode, 136 (163), that 'a man cannot bind one that he shall not use his trade generally,' 'but for a time certain, and in a place certain, a man may be well bound and restrained from using of his trade.' Thus we get an established rule; a contract in general restraint of trade is contrary to public policy; a contract in partial restraint will be upheld." Anson on Contracts, 8th Ed. (1895) 249-50. Where the restraint is partial, reasonable, and founded upon a good consideration, it is valid and will be enforced. 3 Am. & Eng. Ency. of Law, 882. Citing the following cases: Mitchell v. Reynolds, 1 P. Wms. 181; 1 Sm. L. C. (8th Am. Ed.), 756; Whitney v. Slayton, 40 Me. 224; Perkins v. Clay, 54 N. H. 518; Clark v. Crosby, 37 Vt. 188; Hedge v. Lowe, 47 Ia. 137; Arnold v. Kreutzer, 67 Ia. 214; Laubenheimer v. Mann, 17 Wis. 542; Fairbank v. Leary, 40 *Id.*, 637; Keeler v. Taylor, 53 Pa. St. 467; McClurg's App., 58 *Id.* 51; Koehler v. Fearbacher, 2 Mo. App. 11; Wiggins' Ferry Co. v. C. & A. R. R. Co., 73 Mo. 389; Turner v. Jaimson, 7 Dana (Ky.), 435; Stearns v. Barrett, 1 Pick. (Mass.) 443; Linn v. Sigsbee, 67 Ill. 75; Talcott v. Brackett, 5 Ill. App. 60; P. G. & C. Co. v. C. G. & C. Co., 20 *Id.* 473; Bowser v. Bliss, 7 Blackf. (Ind.) 344; Lawrence v. Kidder, 10 Barb. (N. Y.) 641; Chappell v. Brockway, 21 Wend. (N. Y.) 157; Curtis v. Gokey, 68 N. Y. 300; Hoagland v. Segur, 38 N. J. L. 230; Jenkins v. Temples, 39 Ga. 655; Gireaud v. Daudelet, 32 Mo. 561; Lange v. Werk, 2 Ohio St. 519; Thomas v. Mills, 3 *Id.* 274; Hubbard v. Miller, 27 Mich. 15; Lightner v. Menzel, 35 Cal. 468; Boutelle v. Smith, 116 Mass. 111.

Consideration.—The adequacy of the consideration will not be inquired into in such cases. It is enough if some legal consideration appears. Pierce v. Fuller, 8 Mass. 223; Linn v. Sigsbee, 67 Ill. 75; Perkins v. Clay, 54 N. H. 518.

Test to be Applied in such Cases.—The test to be applied in determining whether a restraint upon the exercise of a business, trade or profession, is reasonable or not is to consider whether the restraint is only such as is necessary to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Ellerman v. Chicago Junction Railway & Union Stock Yards Co., 23 Atl. Rep. 287. Where a covenant in restraint of trade is general, that is, without qualifications, it is bad, as being unreasonable and contrary to public policy. Where it is partial, that is, subject to some qualification either as to time or space, then the question is whether it is reasonable; and, if reasonable, it is good in law. Badische Arial Fabrik v. Schott (1892), 3 Chancery Division, 447; Am. Digest, 1895 p. 878.

Physicians.—A contract by a physician for the sale of his "practice and good will" in a specified town is not void as against public policy. In such contract of sale there is an implied covenant that the vendor will not interfere with the enjoyment of what he has sold. If he does, such interference may be restrained by injunction. Dwight v. Hamilton (1873), 113 Mass. 175. In the foregoing case "A" executed a bond to "B" conditioned to convey to him, for a certain sum, his land and buildings, and his practice and good will as a physician. To carry out the agreement, the money was paid by "B's" wife and the real estate conveyed to her. In a suit brought by "B" to restrain "A" from practicing as a physician in violation of his agreement. Held, that as the money was paid by, and the real estate conveyed to the wife by consent of the parties, "A" could not object that "B" had failed to perform his part of the agreement. One who agrees not to practice as a physician in a certain city "and vicinity" is properly enjoined from practicing within ten miles of the city limits. Tinimerman v. Dever, 52 Mich. 34, 50 Am. Rep. 240; 23 Am. L. Reg. 50. Where a physician upon selling out his business agreed "to practice medicine no more" after a certain date in the town where he had been following his profession, and the contract further provided that a stipulated penalty should be paid if the agreement was broken, the penalty is recoverable in an action based upon the breach of the agreement. Martin v. Cluerpley (1891), 129 Ind. 464; but see Mandeville v. Harman (N. J.), 7 Atl. Rep. 37. A complaint by one physician against another to enforce by injunction an agreement of the latter to keep out of practice, which does not show the amount of practice done by each, nor that the business of the plaintiff had been made less renumerative by reason of the breach of the agreement, is not good. Thayer v. Younge, 86 Ind. 259; citing 2 High on Injunctions, 776; Kerr on Injunctions, 513.

Dentists.—A contract was held to be valid in a New York case where the contractor agreed not to re-enter the business of a dentist for a period of four years from May 1, 1893, within the territory bounded by the Harlem river on the north, Seventieth street on the south, East river on the east, and North river on the west in New York City. Niles v. Fenn (1895), 33 N. Y. S. 857. And see Mallan v. May, 11 M. & W. 653. In a Connecticut case, the plaintiff, for a sufficient consideration bought of the defendant his business as a dentist, and the latter executed a contract not to

practice dentistry, within ten miles of Litchfield in said State. Held, that its violation should be enjoined, and that the contract was not void in not fixing a period within which the defendant was not to practice dentistry within those limits. Cook v. Johnson, 47 Conn. 175. And in a Vermont case the contract being, that if the plaintiff, a dentist, would keep himself supplied with mineral teeth by purchases of the defendant, the latter would not sell such teeth to any other person in the place where the plaintiff resided, it was held that the contract being only in partial restraint of trade was not illegal. Clark Adm'r v. Crosby, 37 Vt. 188. But in an English case it was held that an agreement that defendant, a moderately skillful dentist, would abstain from practicing over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff determinable at three months' notice, was unreasonable and void. Honer v. Graves, 7 Bing. 735. In New York it has been held that a contract based upon the consideration of $200 and the sale of certain stock and material not to sell mattresses for five years "in all the territory of the State of New York west of the city of Albany" was void, as embracing too large a territory. Lawrence v. Kidder, 10 Barb. (N. Y.) 641. But see Diamond Match Co. v. Raeber, 35 Hun (N. Y.), 421. Likewise one not to exercise the trade of making printers rollers and composition in New York City, or within 250 miles therefrom, so long as plaintiffs, their survivors or successors, shall continue such business or manufacture. Bingham v. Naigne, 52 N. Y. Sup. Ct. Rep. 90. And in Louisiana where several firms agreed not to sell a certain brand of goods for a certain length of time without the consent of a majority of said firms, on the ground that it was a combination to enhance the price of the article "which is in restraint of trade and contrary to public order." India Bagging Assn. v. Kock, 14 La. Ann. 164. And in New York one between a number of stockholders of a corporation not to sell their stock nor to give powers to vote the same. Fisher v. Bush, 35 Hun (N. Y.), 641. And in Indiana one where a dry goods dealer sold out his business and agreed not to engage in the same business for five years with no limitation as to place. Wiley v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427.

Drug Business—In a North Carolina case the facts were as follows: "One Baker, father of the plaintiff, for the benefit of the plaintiff and for the purpose of starting him in business on his own account, bought of defendant, who for a number of years had been engaged in the business of selling drugs and medicines and preparing prescriptions of physicians in the town of Tarboro, his stock of drugs, etc., and the good will of his business for $1,500 then paid, and the defendant agreed in consideration thereof, not to carry on said business in the town while the plaintiff was engaged in it. The defendant was enjoined from violating his contract, and held guilty of contempt subsequently in disobeying the order of the court in resuming the business as manager for others. Baker v. Cordon (1882), 86 N. C. 116. A contract not to engage in business as a retail butcher for a period of three years within a radius of five miles from a given city, made upon the sale of such a business therein is valid. Brown v. Kling (1894), 101 Cal. 295. Likewise one not to engaged in such business within eleven miles of a small town. Eisel v. Hayes (1895), 40 N. E. Rep. 119. Likewise one not to make, sell or trade in fanning mills south of the Wabash river, within thirty miles of Marion in Grant County, Indiana. Bowser v. Bliss, 7 Blackf. 344. Likewise one not to engage in business within a given territory for five years. Paragon Oil Co. v. Hall, 7 Ohio Cir. Ct. Rep. 240. Likewise one not to engage in the stock yard business for a certain number of years, nor in a given place, nor within 200 miles thereof. Ellerman v. Chicago Junction Railways & Union Stock Yards Co. (N. J. Ch.), 23 Atl. Rep. 287. Likewise one not to engage in the installment clothing business in a certain city for one year after a certain employment terminates, the consideration of such employment being the agreement in question. Sternberg v. O'Brien, 48 N. J. Eq. 370, 33 Cent. L. J., p. 224, see 32 *Id.* 241. Likewise one under penalty of $5,000 not to engage in the manufacture and sale of a certain cheese, the secret of its manufacture and the factory in which it was made having been sold to another. Tode v. Gross, 127 N. Y. 480. The assignor of a lease and the good-will of the business of a baker agreed that he would not during the term assigned solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the premises, without the consent of the assignee. Held, not void, as an unreasonable restraint of trade. Rannie v. Irvine (1844), 7 M. & G. 969. An agreement of the vendor, in consideration of a sale of a lot, not to build a flat in the immediate neighborhood, is not against public policy as being in restraint of trade. Lewis v. Goaliner (N. Y.), 29 N. E. Rep. 81. Nor is one wherein a person selling his type-writing supply business to another agrees that for fifteen years he will not "either in his own name, or otherwise, directly or indirectly, engage in, or aid or instigate others to enter upon or be interested in any business of like nature to that herein by him sold." Underwood v. Smith, 19 N. Y. S. 380.

Contract in Restraint of Trade—Indefinite Duration of.—Where a contract in restraint of trade is indefinite as to the time the restraint is to continue, such omission does not render the same invalid. Bowser v. Bliss (Ind.), 7 Blackford, 344. A contract not to engage in a certain business in a town named while another carries on a business therein is not invalid, as indefinite as to its duration. Eisel v. Hayes (1895), 40 N. E. Rep. 119; Carll v. Snyder (N. J. Ch.), 26 Atl. Rep.

Limitation as to Time.—Whatever difficulty there may be in limiting as to space a contract in restraint of trade, where there is no restriction, it may be limited as to time, so as to be enforced to the extent to which it is limited by a given statute, for the protection of the purchaser while engaged in the business within the limited territory. Brown v. Kling (1894), 101 Cal. 295.

Injunctions—Restraining Seller from Engaging in Rival Business—Good-Will.—Upon the sale of a business and its good-will merely, without any restrictive engagement on the part of the seller, an injunction will not issue against his establishing a rival business and soliciting the customers of the purchaser. Close v. Flesher (1894), 28 N. Y. S. 737.

Same—Damages.—Where a contract in restraint of trade is valid, and the complaint states a breach of it, the plaintiff is entitled to an injunction even if only nominal damages can be proven. Brown v. Kling (1894), 101 Cal. 295. But where the parties to a contract have agreed upon the damages which may be recovered for a breach thereof, the remedy is for the recovery of the sum thus fixed, and injunction will not lie. The sum fixed by the parties themselves, in their contract will, in the absence of fraud, be deemed to be adequate, and the proper measure of damages by the court. Martin v. Murphy (1891), 129 Ind. 464.

Citing Ploughe v. Boyer, 38 Ind. 113; Sims v. City of Frankfort, 79 *Id.* 446; Hendricks v. Gilchrist, 76 *Id.* 369; Ricketts v. Spraker, 77 *Id.* 371; Caskey v. City of Greensburgh, 78 *Id.* 233; Dakin v. Williams, 17 Wend. 447; Johnson v. Gwinn, 100 Ind. 466; Duffy v. Shockey, 11 *Id.* 70; Tode v. Gross, 127 N. Y. 480.

SOLON D. WILSON.

CORRESPONDENCE.

CRITICISM OF MISSOURI DECISION.

To the Editor of the Central Law Journal:

In your No. 5, Vol. 41, you published my criticism of the opinion of the Kansas City Court of Appeals, rendered in State *ex rel.* Mulvihill v. Kumpf *et al.*, respondents. I now take occasion to submit another criticism of another opinion of the same court rendered on another phase of the same case, under the title, State *ex rel.*, etc. relators v. John P. O'Neill, respondent. This was an original proceeding to compel respondent, as sheriff, to execute a writ of *fieri facias* according to its mandate.

On presentation of the information therefor, the court, on consideration, awarded the alternative writ; respondent demurred thereto, for the reason that it did not state facts sufficient to warrant the relief therein sought. The following, except the words and phrases found in parentheses, is the opinion of the court. "Relator instituted an action in the Circuit Court of Jackson county against defendants (George Kumpf, *et al.*), based on (an administrators bond) in the penal sum of $10,000. One Moates filed an interplea wherein he claimed to be entitled to the proceeds of whatever judgment should be rendered on the bond. On trial, judgment was rendered against the interpleader, and also against the defendants (Kumpf, *et al*). The interpleader in due time appealed from the judgment against him. The defendants (Kumpf, *et al*), did not appeal. Plaintiff, notwithstanding the appeal, sued out execution on the judgment, which was, on motion of interpleader, recalled and quashed by the Circuit Court. The plaintiff, thereupon, took an appeal to this court and gave an appeal bond in the nature of a *supersedeas*. He then demanded of the respondent, sheriff, that he proceed to levy the execution. The respondent refused so to do, on the ground that it had been recalled and quashed. Relator then applied to this court for a writ of *mandamus* compelling him to do so, claiming that his appeal bond *supersedes* the order quashing the execution, and therefore it should be executed.

The relator's application shows that when the Circuit Court quashed the execution which had been issued in his favor, he, in due time, took an appeal from the order quashing the execution. Such appeal is now pending in this court. The object of said appeal must be to determine the correctness of the action of the Circuit Court in quashing the execution. If improperly quashed, the order to that effect will be reversed and set aside and thus the sheriff will be free to act in the execution of any proper writ, which plaintiff may take out under the judgment. This proceeding, instituted in the first instance in this court, can have no other object or effect than to give to plaintiff the advantage of an execution of the writ in advance of a determination of whether it was properly issued, or should properly be executed. Whatever rights the relator may have by reason of the grievances which he relates can be obtained through the appeal which he has taken. So we apply to him the rule which obtains in such cases, and deny a *mandamus* where an appeal will lie, since such an appeal affords him an adequate remedy at law. State *ex rel.* v. Megown, 89 Mo. 156, State *ex rel.* v. Lubke 85 Mo. 338. Peremptory writ denied. All concur."

It will be observed that the court did not refuse to award the peremptory writ, for the reason assigned in the demurrer, but on totally different grounds, untrue in point of fact, and insufficient in law, to-wit, "whatever rights the relator may have by reason of the grievances which he relates can be obtained through the appeal which he has taken. So we apply to him the rule which obtains in such cases, and deny a *mandamus* where an appeal will lie, since such appeal affords him an adequate remedy at law." The learned judge writing the opinion cites in support of his conclusion State *ex rel.* v. Megown, 89 Mo. 156; State *ex rel.* Evans v. Lubke, 85 Mo. 338. The first of these cases holds (1), that, "*mandamus* will not lie to control the judgment or discretion of an inferior court;" . . . (2) that "*mandamus* will not lie in this instance because relator has another and specific remedy by appeal." The second of said cases decides simply this, no more no less, that "*mandamus* will not lie to relieve against the acts of an inferior court where the party complaining has a remedy by appeal or writ of error." Was it seriously intended by the learned judge in the use of the above quoted language of his opinion to assert that this proceeding sought to control the action of the court, or that the relator had the right of appeal from the refusal of the sheriff to act, and that therefore, *mandamus* would not lie? If the demurrer was well taken, it was the duty of the court to sustain it, otherwise to overrule it; that it did not sustain the demurrer, is logically conclusive of the proposition that the alternative writ was good and sufficient. That the court did not decide the question of law presented, shows its painful want of appreciation of the high purpose of its creation. It is the duty of all courts in Missouri to exercise all the jurisdiction conferred upon them, whensoever thereto properly invoked. When the people, in their sovereign capacity, enacted Section 10, Art. II, Constitution of Missouri, 1875: "The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character; and that right and justice shall be administered without sale, denial or delay," they knew they had instituted a model judicial system, at least on paper. Alas, what has been the fruit thereof. The court in the opinion quoted misconceived, misstated the case, and the questions involved, in the several particulars following (1), this is not an attempt to reach, control or influence the action of a judicial tribunal; if it were, as there is by law a right of appeal from or writ of error upon the judgments of inferior courts, the relators could, and probably would, have pursued such remedy which is not at all novel, and in that case the writ of *mandamus* would have found no place in the history of this case. On the other hand an appeal was taken from the order of the Circuit Court as stated in the opinion, but the two proceedings mentioned in the opinion were as separate and independent as any other two cases then pending in that court, their only coincident is similarity of title. But that is not this case. (2) If the sheriff had been a judicial officer, and his non-action complained of, judicial in character, from which an appeal, etc., might have been prosecuted to a revisory judicial tribunal, the opinion of the court would have been proper, and the authorities cited would have tended to support its conclusion which as an abstract propo-

sition of law, predicated of the supposititious statement of facts made by the court, is probably correct. It is here conceded. But that is not this case.

The officer whose action is sought to be directed and controlled by this proceeding, is not a judicial officer; he possesses but few, if any, judicial powers or functions, certainly none as pertains to the matter here involved. No appeal lies from or writ of error upon his judgment (in this case refusal to act ministerially), to any other judicial tribunal. If such were true, we would readily concede the correctness of the opinion, and the force of the authorities cited in its support. But this is not this case.

In this case, the officer whose conduct is sought to be controlled by this proceeding is the sheriff of Jackson county, who is not a judicial officer. His functions and duties are not judicial generally; in this case they are purely ministerial or executive, that of levying an execution, an ordinary *fiere facias*, issued by authority of the statute law of the State, who invokes this high remedial writ of right. From the judgment of this officer (in the present case refusal to act) no appeal is provided. No writ of error or other appellate proceeding will lie. It follows, as a logical necessity, that the opinion of the court is wholly erroneous. The authorities cited in the opinion of the court do not even tend to support the conclusion arrived at by the court in its opinion as applicable to the facts of this case. It is well to remark here that the writ of *mandamus* is peculiarly adapted to the enforcement of merely ministerial duties, as in this case—this at least is axiomatic. "If there be a right and no other specific remedy this writ should not be denied."

Second. It is probably well to state here with emphasis, in order to avoid falling into error, that there is no statement of fact contained in the alternative writ, from the first to the last word thereof, from or upon which the court could rightfully assume to review the action of the Circuit Court. This court is called upon by the writ and demurrer thereto to pass upon two simple questions of law, not of fact, no more, no less.

First. What is the effect of the appeal and *supersedeas* bond, approved by the court below, on its order quashing the execution?

Second. What was the duty of the sheriff on the facts disclosed by the alternative writ?

It was the duty of the court to pass upon both of these questions; it refused to pass upon either, and no one knows to-day what would have been the result of a fair judicial examination thereof. It seems the court did not examine them, if so it did not give us the benefit of its researches. While it is not so stated, yet the court seems to have exercised its judicial discretion, and refused to adjudicate a plain question of law properly presented to it. Had the court examined the question, it would have been compelled by precedent to hold that the order quashing the execution, appealed from was superseded by such appeal; that it was the duty of respondent to execute the writ, and the peremptory *mandamus* would have been awarded. Parker v. Hannibal & St. J. R. R., 44 Mo. 415; State *ex rel.* Duggan v. Dillon, 98 Mo. 90. I want to say here, I have never known judicial discretion to be invoked as a screen to cover judicial virtue from public gaze. Who can say as much for judicial vice?

A learned author speaking of the judiciary said: "It must possess wisdom, learning, integrity, independence and firmness." Firmness without wisdom or learning is pitiable. Learning without integrity is not to be trusted. In this case the court both ignored and violated every mandatory word and phrase; the whole of the constitutional provision above quoted. The limit of judicial power is the extent of judicial duty. Both are bounded by the same horizon. No assertion of judicial discretion, however vociferously and frequently proclaimed, can change the common boundary of jurisdiction and duty. *Fiat justitia ruat cœlum.*

R. O. BOGGESS.

Kansas City, Mo.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADVERSE POSSESSION.—D, having entered on land which he supposed to be vacant, intending to pre-empt it, improved it, and remained in possession until his death, 18 years afterwards, when the improvements, without the land, were sold; D's heirs subsequently releasing to the purchaser of the improvements their claim to the land, for a nominal consideration: Held, that D's possession was not adverse to the real owner.—HARTMAN v. HUNTINGTON, Tex., 32 S. W. Rep. 562.

2. ADVERSE POSSESSION.—The mere cutting of timber during a particular year on woodland is not an assertion of the right which will mature title to such land, where it is not continuous, or, if it is, there is nothing to show that, though the land was not susceptible of other use while covered with timber, it could not have been cleared and cultivated, regardless of its capacity for profitable production.—SHAFFER v. GAYNOR, N. Car., 23 S. E. Rep. 154.

3. ANIMALS—Running at Large—Liability of Owners.—Whether the owner of an unaltered mule has exercised such care to prevent the animal's running at large as a prudent man would exercise under similar circumstances is for the jury.—BRISCOE v. ALFREY, Ark., 32 S. W. Rep. 505.

4. APPEAL — Bond — Waiver.—Where, in an action against a corporation and its directors, one of the directors dies before judgment, and the action abates as to him, an appeal bond given by the other directors, against whom judgment was rendered in favor of plaintiff, payable to plaintiff and the corporation, and also to the deceased director, his heirs, and representatives, is not so fatally defective as to deprive the appellate court of jurisdiction.—FUTCH v. PALMER, Tex., 32 S. W. Rep. 566.

5. APPLICATION OF PAYMENTS.—In an action on a note secured by chattel mortgage, an instruction that the proceeds of mortgaged property cannot be applied to another debt without the consent of both parties was properly refused, the court having already charged that all payments should be applied to the secured debt in the absence of an agreement to the contrary,

regardless of the source of the funds paid.—LARKIN v. WATT, Tex., 32 S. W. Rep. 552.

6. CARRIERS—Detention of Cars.—A railroad company may make a reasonable charge for the unreasonable detention of its cars.—KENTUCKY WAGON MANUF'G CO. v. OHIO & M. RY. CO., Ky., 32 S. W. Rep. 595.

7. CARRIERS OF STOCK—Notice of Injury.—Where the validity of a carrier's contract depends upon the reasonableness of a provision that in case of injury to stock the shipper must give notice of his claim therefor, in writing, to the agent, before it is delivered to any connecting line, or taken from the station, the carrier must, in order to avail itself of this provision as defense in an action by the shipper for damage so suffered, allege in its answer a state of facts showing that the shipper had failed to give the notice before defendant delivered to its connecting line, and that he had the opportunity to do so.—HOUSTON & T. C. RY. CO. v. DAVIS, Tex., 32 S. W. Rep. 510.

8. CONSTITUTIONAL LAW — Imprisonment for Debt.—Acts 1895, ch. 67, authorizing the imprisonment of one who fraudulently obtains accommodation from an hotel, inn, or boarding-house keeper, or who fraudulently removes his baggage without the consent of such keeper, does not violate Const. art. 1, § 18, forbidding the legislature from passing any law authorizing imprisonment for debt.—STATE v. YARDLEY, Tenn., 32 S. W. Rep. 481.

9. CONTRACT IN RESTRAINT OF TRADE.—An agreement to permanently cease selling buggies in a certain county is not void, as in restraint of trade.—DAVIS v. BROWN, Ky., 32 S. W. Rep. 614.

10. CONTRACT TO DEVISE.—A testator's contract with his daughter to refund certain money to her if she did not "heir" a particular portion of his land at his death was not fulfilled by a devise of a life estate to her, with remainder to his other children in the event of her death without issue.—PARROTT v. GRAVES' EX'X, Ky., 32 S. W. Rep. 605.

11. CORPORATIONS — By-laws—Officers.—A corporation, whose charter vests the management of its affairs in a board of directors, cannot, by a by-law, substitute an executive committee for such board.—TEMPLE v. DODGE, Tex., 32 S. W. Rep. 514.

12. CORPORATION—Insolvent—Preferring Creditors.—A corporation organized under the laws of this State, which is in an insolvent condition, cannot prefer, as a creditor, one of its officers.—MALLORY v. KIRKPATRICK, N. J., 33 Atl. Rep. 205.

13. CREDITORS' BILL—Rights of Creditors.—Where a bill to set aside a general assignment for fraud has been filed by a creditor on behalf of himself and other creditors, and a decree rendered annulling the assignment, and directing the assets to be distributed among complainants, other creditors, who were not parties to the proceeding, will not be permitted to intervene and share in the distribution.—SENTER v. WILLIAMS, Ark., 32 S. W. Rep. 490.

14. CRIMINAL LAW—Accomplice. — One who agreed with defendant to steal, and who actually assisted in the taking, and who was not shown to have abandoned his original purpose until a short time before the taking, when he communicated the agreement to others, was an accomplice.—MCKENZIE v. STATE, Tex., 32 S. W. Rep. 543.

15. CRIMINAL LAW—Assault with Intent to Rape—Sufficiency of Evidence.—Evidence that defendant, while in a sitting position on a path leading from prosecutrix's house to a well, solicited her as she passed him on her way to the well to have sexual intercourse with him; that, on her reply that she was not that kind of a woman, he followed her with his privates exposed, to a fence near the well, but did not go beyond it; and that he was never nearer her than 12 feet,—is insufficient to show an assault with intent to rape.—STATE v. JEFFREYS, N. Car., 23 S. E. Rep. 175.

16. CRIMINAL LAW—Disposing of Mortgaged Chattels.—On trial for unlawfully disposing of mortgaged goods with intent to defeat the rights of the mortgagee, evidence that, five months after the offense was committed, defendant attempted to dispose of other property covered by the mortgage, is inadmissible on the question of intent.—STATE v. JEFFREYS, N. Car., 23 S. E. Rep. 168.

17. CRIMINAL LAW—Forgery—Check.—On a trial for forging a check purporting to be drawn by a corporation through its manager, a charge that it would be forgery if the instrument was made by a person other than the corporation or its manager, was not defective in that it omitted to add, "or the corporation by its manager."—WILLIAMS v. STATE, Tex., 32 S. W. Rep. 533.

18. CRIMINAL LAW—Games of Chance.—The putting up by each of several persons of a piece of money, and the deciding, by throwing dice, which of such persons should have a certain turkey, constitutes a game of chance.—STATE v. DE BOY, N. Car., 23 S. E. Rep. 167.

19. CRIMINAL LAW—Minor—Punishment of Crime.—A boy under 14 years old is not punishable for gambling with dice (a misdemeanor) where he did not know that it was unlawful, though he was capable of discerning between right and wrong.—STATE v. YEARGAN, N. Car., 23 S. E. Rep. 153.

20. CRIMINAL LAW — Perjury. — Perjury cannot be predicated on an oath administered by a *de facto* officer.—WALKER v. STATE, Ala., 18 South. Rep. 393.

21. CRIMINAL LAW—Robbery.—Under Pen. Code, art. 722, which provides that, "if any person by assault, or by violence and putting in fear of life or bodily injury, shall fraudulently take from the possession or person of another any property," he shall be guilty of robbery, the mere snatching of money from another's hand is not such force as will constitute robbery.—JOHNSON v. STATE, Tex., 32 S. W. Rep. 587.

22. DEATH BY WRONGFUL ACT.—Mill & V. Code, §§ 3130, 3131, gave a right of action for death by wrongful act to the personal representative, for the benefit of the widow or next of kin, the damages recoverable being those to which deceased would have been entitled had he lived. Section 3132 provides that the widow may prosecute the action in her own name, and if there be no widow, then the children may sue in their names. Section 3134 provides for the recovery, in such action, of damages resulting through the death to the parties for whose benefit the right of action survives, in addition to those which deceased could have recovered, but does not change the mode of suing: Held, that the action can only be brought by the personal representative, save in the excepted cases of the widow and children, and hence an action in the names of parents, as such, for the death of a minor child will not lie, though they be beneficially entitled to the recovery as next of kin.—HOLSTON v. DAYTON COAL & IRON CO., Tenn., 32 S. W. Rep. 486.

23. DEED—Married Woman — Acknowledgment. — Where a married woman's acknowledgement was void for want of privy examination, her subsequent acknowledgment to the same deed, made after her husband's death, and after a second husband abandoned her, is equivalent to a re-execution of the deed.—CHESTER v. BREITLING, Tex., 32 S. W. Rep. 527.

24. EQUITY — Reformation of Mortgage. — In the absence of statute, equity will reform a mortgage after record so as to include land omitted by mistake, thereby rendering the lien of a purchaser with notice of the facts, at execution sale of the part omitted, made after the mortgage was recorded and before the reformation, subsequent to the lien of the mortgage.—FT. SMITH MILLING CO. v. MIKLES, Ark., 32 S. W. Rep. 498.

25. EVIDENCE—Character.—A person's reputation for truth and veracity may be shown by witnesses who had a long acquaintance with him, though they have not seen him for several years, and are ignorant of the place of his present residence.—BROWN v. PEREZ, Tex., 32 S. W. Rep. 546.

26. EVIDENCE—Declarations to Physician.—In an action for personal injuries, it appeared that a year after

the accident, when plaintiff's condition had much improved, and while under the care of another competent physician, he called on a physician of great reputation as a medical expert, made certain statements as to his condition and symptoms, and requested an opinion and physical examination. This expert was produced on the trial, and his evidence was mainly relied on by plaintiff on the question of his injuries: Held, that these circumstances showed that plaintiff called on the expert physician merely to qualify him to testify in his favor, and that hence his statements to the latter were inadmissible.—DELAWARE, L. & W. R. Co. v. ROALEFS, U. S. C. C. of App., 70 Fed. Rep. 21.

27. FRAUDULENT CONVEYANCE — Securing Surety.—A failing debtor may protect his surety by a transfer of goods reasonably proportioned in value to the amount of the debt.—KEATING IMPLEMENT & MACHINE CO. v. TERRE HAUTE CARRIAGE & BUGGY CO., Tex., 32 S. W. Rep. 556.

28. GARNISHMENT—Claim in Tort.—A claim in tort for damages is not subject to garnishment until merged in a final judgment.—KREISLE v. CAMPBELL, Tex., 32 S. W. Rep. 581.

29. GUARANTY.—The guarantors on a note given for the purchase price of a machine may avail themselves of the defense of breach of warranty to the vendee and maker of the note, and plead the failure of the consideration passing from the payee to him as a failure of the consideration passing to them, where their guaranty was made at the time of the execution of the note, and for no independent consideration.—WALTER A. WOOD MOWING & REAPING MACH. CO. v. LAND, Ky., 32 S. W. Rep. 607.

30. INJUNCTION TO RESTRAIN COLLECTION OF TAX—Not Granted, When.—A federal court will not enjoin the collection of a tax which is only a personal charge against the party taxed, or charge upon his personal property.—LINEHAN RAILWAY TRANSFER CO. v. PENDERGRASS, U. S. C. C. of App., 70 Fed. Rep. 1.

31. INSURANCE—Iron Safe Clause.—A clause in a fire policy on a stock of liquors, etc., in a saloon, providing that the insured should keep his books in a fireproof safe at night, and at all times when the store mentioned in the policy was not actually open for business, is valid, and the effect thereof cannot be defeated by showing that the insured maintained the saloon in connection with his hotel; that the saloon was kept open for business both night and day, and was closed only on Sunday; that the insured kept but one set of books for the hotel and saloon; that he was obliged to frequently refer to the same for the settlement of his guests' accounts, and for that reason kept them under a counter, and they were not placed in the safe oftener than once a month.—SOUTHERN INS. CO. v. PARKER, Ark., 32 S. W. Rep. 507.

32. INSURANCE — Vacancy of Building. — Where a vacancy permit was attached to a policy on buildings owned by two persons, and defendant instructed its local agents to cancel said permit at the expiration thereof, and said instruction was shown to one of said owners, defendant was not liable for a loss occurring after the permit expired, though the local agents had consented to temporarily extend the permit.—MCLEARY v. ORIENT INS. CO., Tex., 32 S. W. Rep. 583.

33. INSURANCE POLICY—Burden of Proof.—In an action on a certificate of insurance, issued subject to all the conditions in an open policy which was retained by the insurer, it is not necessary for the insured to allege and prove compliance with the conditions of said policy, as that is a matter of defense.—MERCHANTS' INS. CO. v. ARNOLD, Tex., 32 S. W. Rep. 579.

34. JUDGMENT—Satisfaction—Attorney and Client.—An attorney of record has no power to satisfy a judgment upon receiving less than the amount due thereon, without the consent of his client.—FAUGHNAN v. CITY OF ELIZABETH, N. J., 33 Atl. Rep. 212.

35. LANDLORD AND TENANT—Tenant's Administrator.—On the death of a lessee his administrator is bound to perform the conditions of the lease.—WILCOX v. ALEXANDER, Tex., 32 S. W. Rep. 561.

36. LIFE INSURANCE—Application—Rescission of Contract.—That defendant company agreed to issue plaintiff a life insurance policy on which the premiums should be payable semi-annually, while the policy actually delivered provided for their annual payment is no ground upon which to base an action for deceit.—NEW YORK LIFE INSURANCE CO. v. MILLER, Tex., 32 S. W. Rep. 550.

37. LIMITATIONS—Action on Mortgage.—A mortgage executed in 1883, securing an open account, recited that it was given for $594, the receipt of which it acknowledged; that it was to become void if the mortgagors paid $594, with interest at 10 per cent. per annum thereon, 24 months from its date, to the mortgagee. A payment of $75 was indorsed on it October 20, 1887. Held, that the recitals did not show a promise to pay, and make the mortgage evidence of the debt, so as to make the 18 years limitation applicable, instead of the 3-years, relating to debts on open account, in bar of foreclosure, under Act March 31, 1887.—HOLIMAN v. HANCE, Ark., 32 S. W. Rep. 498.

38. MALICIOUS PROSECUTION— Probable Cause. — In suits for malicious prosecution, the question of the existence of reasonable cause—the facts not being in dispute—must be decided by the court. — BELL v. ATLANTIC CITY R. CO., N. J., 33 Atl. Rep. 211.

39. MARRIAGE— Validity.— A person having a wife living and undivorced cannot contract a second valid marriage; and his relations with another woman, though assumed under the forms of a regular marriage, confer on her no rights in the husband's property as community property, as such rights, being conferred by statute, depend on a valid marriage.—CHAPMAN v. CHAPMAN, Tex., 32 S. W. Rep. 564.

40. MASTER AND SERVANT — Fellow-servants.— The employees of a railroad company running a through freight are not fellow servants of employees of the same company running one of its local freights, picking up freight and empty cars.—GALVESTON, H. & S. A. RY. CO. v. WORTHY, Tex., 32 S. W. Rep. 557.

41. MASTER AND SERVANT—Payment.—If a workman agree with his employer to take pay for his work in part in merchandise, the merchandise so furnished does not constitute a ground of set-off; it is a payment, and goes in deminution of the claim for work.—CUMBERLAND GLASS MANUF'G CO. v. STATE, N. J., 33 Atl. Rep. 210.

42. MASTER AND SERVANT— Railroad Employees.—A car cleaner, while at work inside a coach on a side track, was injured by another coach being kicked against it at an unusual and dangerous rate of speed: Held, that he was exposed to the hazards and dangers of railroading, and could recover under the doctrine laid down in Pearson v. Railroad Co., 49 N. W. Rep. 302, 47 Minn. 9.—MITCHELL v. NORTHERN PAC. R. CO., U. S. C. C. (Minn.), 70 Fed. Rep. 15.

43. MECHANIC'S LIENS—Filing of Contract.—When it appears by the contract that the builder is to do all the work and furnish all the materials necessary for the construction of a building, it is not necessary to file the specifications with the contract in order to protect such building from the liens of mechanics and material-men under the provisions of the second section of the mechanics' lien law.—LA FOUCHERIE v. KNUTZEN, N. J., 33 Atl. Rep. 203.

44. MORTGAGE FORECLOSURE.—In an action to foreclose a mortgage, an objection to the admissibility of a judgment foreclosing mechanics' liens on the property in favor of some of defendants, on the ground that plaintiff was not a party to such foreclosure proceedings, is without merit, where plaintiff conceded that it was admissible for a specific purpose, and the court ruled that plaintiff was not bound by it.—LAND MORTGAGE BANK OF TEXAS 5 LIMITED v. QUANAH HOTEL CO., Tex., 32 S. W. Rep. 573.

45. NEGLIGENCE.—A complaint alleging that defendant negligently operated its hand car at a speed of

more than 15 miles an hour, by a noisy and disorderly crew, from behind an obstruction near a crossing; that the operation thereof in such manner was calculated to frighten a very gentle horse, and did frighten plaintiff's horse, which was of that character,—failing to aver that what was complained of was unusual, and such as common prudence would condemn,—does not state a cause of action based on defendant's negligence.—McCERREN v. ALABAMA & V. RY. CO., Miss., 18 South. Rep. 420.

46. NEGLIGENCE—Blasting.—Plaintiff, while walking along a public road about dusk, was struck and injured by a rock thrown from G's mill race, over 100 yards away, where blasting was being done by an employee of G. No means were taken to restrict the flight of rock within safe limits, nor was any danger notice given: Held, that G and his servant were liable.—CATES v. LATTA, N. Car., 23 S. E. Rep. 173.

47. PARTNERSHIP—Power of Partner — Mortgages.—The implied power of one partner to mortgage firm property is revoked by a dissent of his copartners, known to the mortgagee when he takes his mortgage.—CARR v. HERTS, N. J., 33 Atl. Rep. 194.

48. PRINCIPAL AND AGENT—Notice to Agent.—Since a railroad station agent has no apparent power to contract for the company for the shipment of goods from another station, notice to such agent of the necessity for dispatch in shipment thereof is not notice to the company.—MISSOURI, K. & T. RY. CO. OF TEXAS v. BELCHER, Tex., 32 S. W. Rep. 518.

49. PRINCIPAL AND SURETY—Official Bond.—The fact that municipal authorities intrusted with the duty of requiring and accepting official bonds of officers, knowing that an officer was in default, failed to inform those intending to become sureties of the facts, or falsely represented to them that he was not in default, and had discharged his duties with fidelity, will not avoid the bond.—CITY OF HALLETTSVILLE v. LONG, Tex., 32 S. W. Rep. 567.

50. RAILROAD COMPANIES—Killing Stock.—In an action for killing stock, where defendant, by the uncontradicted testimony of its employees in charge of the train, proves that the killing could not have been avoided by the exercise of ordinary care, a verdict for plaintiff is not supported by the evidence.—McGHEE v. GUYN, Ky., 32 S. W. Rep. 615.

51. RAILROAD COMP. NIES — Killing Stock.—In an action against a railroad company for damages for killing a cow, evidence that defendant company failed to post notice of the animal killed, as required by statute, is incompetent, in the absence of an allegation of such failure in plaintiff's statement of his cause of action.—ST. LOUIS & S. F. RY. CO. v. KIMMONS, Ark., 32 S. W. Rep. 505.

52. RAILROAD COMPANY — Negligence.—A railroad company is not ordinarily liable for injuries sustained at a crossing on proof merely that it knowingly used a track "so constructed and maintained as to be dangerous to the public;" it appearing that said road was necessarily dangerous, but such liability must depend upon the care taken to avoid accident.—TEXAS & P. RY. CO. v. WARREN, Tex., 32 S. W. Rep. 578.

53. RAILROAD COMPANIES — Negligence — Defective Crossing.—In an action for injuries occasioned by the running away of plaintiff's horse while on a bridge erected by defendant railroad company over a ditch at a crossing of its track, alleged to have been caused by defendant's negligence in not properly constructing and maintaining the bridge, the company was bound to show ordinary care only. It was error to charge that it was defendant's duty to erect and maintain a "safe" and suitable bridge across and over the ditch cut by it along the side of its railway, or that, if it was necessary for the bridge to be erected, "it was the duty of the railroad to erect and maintain such a bridge so that the highway should be restored to as passable a condition, and so kept, as was consistent with the use of the railroad company, and, if guard rails were required for that purpose, then it was the duty of the railroad company to place guard rails or bannisters upon the bridge."—ST. LOUIS, I. M. & S. RY. CO. v. AVEN, Ark., 32 S. W. Rep. 500.

54. RAILROAD COMPANY—Street Railways — Mortgage Foreclosures.—A claim for damages for personal injuries, caused by the negligence of a street railway company five months before the appointment of a receiver in mortgage foreclosure proceedings, is not entitled to priority of payment over the mortgage debt out of the earnings accruing during the receivership. Such a claim is not based upon any considerations inuring to the benefit of the mortgage security, or tending to keep the road a going concern.—ST. LOUIS TRUST CO. v. RILEY, U. S. C. C. of App., 70 Fed. Rep. 32.

55. RECEIVERS—Compensation.—Where a receiver is appointed at the instance of plaintiff, and the appointment revoked on appeal, but, pending the appeal, such appointee gives bond, and proceeds with the management of the property, he is entitled, on final settlement, to be paid his expenses and commissions out of the proceeds in his hands as receiver, regardless of the ultimate result of the litigation.—ESPUELLA LAND & CATTLE CO. v. BINDLE, Tex., 32 S. W. Rep. 582.

56. SUNDAY LAW — Work of Necessity.—Where, on a trial for Sabbath breaking, the State proves that defendant performed labor on Sunday, not apparently a work of necessity, the burden is on defendant to show that such work was of necessity.—SHIPLEY v. STATE, Ark., 32 S. W. Rep. 489.

57. WILLS—Charities—Trusts.—A bequest to a church, "to be used in solemn masses for the repose of my soul," is not valid as a direct bequest to the church for its general uses.—FESTORAZZI v. ST. JOSEPH'S CATHOLIC CHURCH OF MOBILE, Ala., 18 South. Rep. 394.

58. WILLS—Community Property.—A devise to testator's wife of "all that portion of land I own" between certain lines, "including my homestead," is a disposition of such lands as the property of testator in entirety, so that the widow must elect to take thereunder or claim her community interest.—CHACE v. GREGG, Tex., 32 S. W. Rep. 520.

59. WILL—Issue.—Where a will in one clause provided that on the death of the last of three daughters leaving issue "said issue to take the distributive share of the trust capital belonging to his, her, or their mother, and the residue of said capital fund, if any, to be divided equally among the children of my said three daughters; that is, my grandchildren to inherit in the right of their respective mothers," and a subsequent clause provided "that, should the last survivor of my said three daughters die without issue, then the capital of the trust fund shall be divided among the children and issue of said three daughters in the manner before stated," only the issue of said three daughters were entitled to inherit upon the death of their mother, or upon the death of the last survivor, and the issue of said issue were not so entitled.—GAMMELL v. ERNST, R. I., 33 Atl. Rep. 222.

60. WITNESS—Competency of Wife.—Code 1892, § 1739, provides that a husband and wife may testify for each other "in all cases." Section 1740 provides that a person cannot testify "to establish his own claim" against the estate of a deceased person which originated during the life of decedent: Held, that a wife is a competent witness for her husband in establishing his claim against a decedent's estate arising out of a deed to him from decedent.—SAFFOLD v. HORNE, Miss., 18 South. Rep. 433.

61. WITNESS — Impeachment.—Where an attempt is made to impeach a witness by showing that he has made contradictory statements out of court, he may be supported by proving that, shortly after the transaction to which his testimony relates, he made statements of the matter to others, similar to those given in evidence.—DICKER v. STATE, Tex., 32 S. W. Rep. 541.

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